IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.32/2003

Pralhad Bhagat,
presently undergoing sentence
at Central Jail, Aguada,
Bardez, Goa. ..... Appellant.

V/s.

S T A T E ..... Respondent.

Mr. Arun Bras de Sa, Advocate for the appellant.

Mr. S.N. Sardessai, Public Prosecutor for the respondent/State.

CORAM : P.V. HARDAS, J.

DATE : 11TH SEPTEMBER, 2003.

ORAL JUDGMENT :

The appellant, by this appeal, challenges his conviction for an offence punishable under Section 20(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act (hereinafter, referred to as 'the NDPS Act') and sentence of Rigourous Imprisonment for 10 years and fine of Rs.1,00,000/-, in the event of non-payment of fine, Simple Imprisonment for one year, passed by the Special Judge, N.D.P.S. Court, Mapusa in Special Criminal Case No.24/2000.

2. The facts, in brief, as are necessary for the decision of this appeal, are set out hereunder :

PW.4 Police Inspector, Sandesh Chodankar states that in January, 2000 he was working as P.S.I. at Anjuna Police Station. On 16.1.2000 at about 6.00 a.m. he received a telephonic call from a person, who did not disclose his identity, informing him that a male in the age group of 40 to 45 years, wearing full sleeves blue coloured T-shirt, gray pant, and red and black cap was proceeding towards Blue Bar, Anjuna and was in possession of charas in a black coloured bag. The informant also informed PW.4 that the said person would probably book a room in Guru Bar, at Anjuna. On receipt of the information, PW.4 PI Chodankar reduced the said information into writing and a copy thereof was sent to PW.5 Shri A.K. Gawas. The copy of the information received by PW.5 Shri A.K. Gawas is at Exhibit-30 colly. PW.4 PI Chodankar then accompanied by other police personnel left for raid carrying with him kit box, containing weighing, sealing material, envelopes, papers, etc., and seal of the Police Station. One Police Constable Prabhakar Parab was directed to secure presence of panch witnesses. At about 6.30 they reached near flee market and on the beach they saw a person whose description matched with the description already received him. PW.4 PI Chodankar accompanied by other police officers went upto the accused and told him to stop. In the meantime, Police Constable Prabhakar came along with two panch witnesses PW.3 Janardhan and

Vinayak Malwankar. PW.4 PI Chodankar then disclosed to the panch witnesses the information which he had received and asked them whether they were willing to act as panch witnesses to the search. Both the panch witnesses expressed their willingness to act as panchas. PW.4 PI Chodankar then introduced both the panchas to the raiding party and in the meantime, PW.5 Shri A.K. Gawas arrived at the scene. The accused was asked his name and he disclosed his name as Pralhad Bhagat, resident of Kullu. The accused was informed about the information received by PW.4 earlier and was told that the raiding party wanted to take his search for drugs. The accused was then introduced to the members of the raiding party and was informed that he had a right to be taken either before a Gazetted Officer or a Magistrate of his choice for the purpose of search. The accused informed that his search need not be taken either in the presence of a Gazetted Officer or a Magistrate. The search of the members of the raiding party was offered, but was declined by the accused. PW.4 PI Chodankar then commenced the search of the person of the accused and in front pocket of his pant, he found 4 pieces of black colour substance resembling charas. The said black colour substance was packed and on weighing was found to weigh 28 grams. It was packed and sealed with the seal of the Anjuna Police Station. In the right hand pant pocket, a black colour wallet containing cash of

Rs.500/- and a Railway ticket of Hazrat-Nizammuddin to Margao was found. The said wallet was also packed and sealed with seal of the Anjuna Police Station. The search of the bag which the accused was carrying, was undertaken and on opening the said bag, black colour substance in various type shapes wrapped in a towel was found. The substance was weighed and it was found to weigh 4.5 Kgs. The said substance was packed and sealed with the seal of Anjuna Police Station. On all the packets, signatures of the panchas were obtained and it was also signed by PW.4 as well as the accused. The pant which the accused was wearing also came to be attached. The accused was asked if he could produce any documents in respect of possession of drugs, but the accused could not produce any documents and accordingly, he was then informed that the possession of the drugs without valid documents was an offence. A seizure report evidencing the seizure of the drugs at Exhibit-11 colly was prepared which was also signed by the panch witnesses, accused and PI Chodankar. The panchanama of the entire sequence was drawn at Exhibit-11 colly. The accused was informed the grounds of his arrest and was taken into custody and was brought to the Anjuna Police Station. A complaint at Exhibit-27 in this regard was lodged by PW.4 PI Chodankar. The seized muddemal property was handed over to Writer PW.6 Ganpati Warkar and a receipt at Exhibit-28 was obtained. PW.4 sent an

intimation under Section 57 of the NDPS Act to his superiors, which is at Exhibit-29. The muddemal property was forwarded for analysis with a covering letter which is at Exhibit PW.1/B with the specimen seal impression of Anjuna Police Station. The property for analysis was received by PW.2 Manohar Joshi on 17.1.2000 who had acknowledged the same on the letter at Exhibit PW.2/A. He had kept the property in a steel cupboard and had forwarded the same through H.C. Parab for analysis. The muddemal property was analysed by PW.1 Mahesh Kaissare who has prepared his report at Exhibit PW.1/C and opined that the substance analysed by him tested positive for charas. After completion of the investigation, a charge-sheet against the present appellant came to be filed. The learned Special Judge, NDPS Court, Mapusa vide Exhibit-5 framed Charge against the appellant herein, who pleaded not guilty and claimed to be tried. The prosecution, in support of its case, examined six witnesses. The learned trial Court, on appreciation of the evidence, found that the prosecution had proved the offence beyond reasonable doubt and, therefore, convicted and sentenced the accused as aforestated.

3. The pivot of the prosecution case is the testimony of PW.4 PI Sandesh Chodankar. PW.4 PI Chodankar states about the receipt of information and

forwarding the same to PW.5 A.K. Gawas and then proceeding for raid. He then states about noticing the accused and arrival of the panch witnesses and about explaining the receipt of information to the panch witnesses. He states about apprising the accused of his right under Section 50 of the NDPS Act and the seizure of the drugs from the pant pocket as well as seizure of the drugs from the bag of the accused. He then states about panchanama, taking of the accused into custody and lodging the complaint. He then states about depositing of the seized property with PW.6 Ganpati Warkar and obtaining a receipt from PW.6 at Exhibit-28. In the cross examination, he has admitted that he had detained the accused and shortly thereafter, the panchas arrived. He has also admitted that in the complaint he had recorded that the accused had showed his willingness to be searched before the S.D.P.O. PW.5 A.K. Gawas and declined that his search be taken before a Magistrate. He has further stated that he had not scribed the panchanama and therefore the statement of PW.3 Janardhan Parab that the panchanama was scribed by him was incorrect. He has also admitted not to have made a reference in the complaint that right was conveyed to the accused, both in English and in Hindi.

4. PW.3 Janardhan Parab states that on 16.1.2000 he was proceeding from Vagator to Dando for

his work and at about 6 a.m. P.S.I. Chodankar requested him to come to the beach. He states that he was asked whether he was willing to act as a panch and agreed to act as a panch witness. PSI Chodankar then informed about the information received by him, which information was reduced into writing and a copy of which was sent to Dy.S.P. Gawas. PW.4 Chodankar introduced him to other members of the raiding party and then introduced him to the accused. He states about PW.4 informing the accused that if he wanted his search could be taken before a Gazetted Officer or a Magistrate, but the accused declined. The accused also declined the offer to search the members of the raiding party. PW.3 Janardhan then states about the seizure of the drugs from the possession of the accused and sealing the same. In cross examination he states that PSI was with four policemen when he stopped him, while he was walking along the beach for going to the hotel for duty. It was at about 7.15 a.m. when he was stopped. He further states that other panch Vinayak Malwankar was also present with the police when he was stopped. He has further stated that the talk between PSI Chodankar and the accused took place before he was stopped by the police. He has further stated that no writing was done prior to the accused was being detained by PSI Chodankar. He has further stated that he was unable to produce the exact words in Hindi used by the PSI

Chodankar while conveying the right to the accused. He has admitted as correct that the accused had stated that he could be searched before S.D.P.O. Gawas and it was not necessary to take him to a Magistrate. He has further stated that the writing of the panchanama was done by PSI Chodankar. In the panchanama at Exhibit-11 colly it is stated that PSI Chodankar informed the accused that he had a right to be searched before a Gazetted Officer or a Magistrate of his choice and the accused was further informed that S.D.P.O. Mapusa who was present was a Gazetted Officer. The accused had stated that his search could be taken in the presence of S.D.P.O. Mapusa and there was no need to call a Magistrate.

5. PW.5 Dy. S.P. Arvind Gawas states about receipt of copy of the information from PW.4 Chodankar and states that on reaching the beach he saw one person surrounded by the police and the jeep. He was introduced to two panchas by PW.4 PSI Chodankar and thereafter, the accused was questioned. PSI Chodankar informed the accused of his right to be searched before a Magistrate or a Gazetted Officer, however, the accused declined the said offer. PSI Chodankar then offered the search of the raiding party which also the accused declined. He then states about the seizure of the contraband from the possession of the accused. In cross

examination, an omission was brought out regarding the accused declining the offer of being searched either before a Magistrate or a Gazetted Officer. He has further admitted that he was introduced to the accused as S.D.P.O. when the offer was made to him and only thereafter the accused was informed that he was a Gazetted Officer.

6. PW.6 Ganpati Warkar states that on 16.1.2000 PSI Chodankar had handed over to him 5 sealed envelopes. Accordingly he had issued receipt Exhibit-28. On 17.1.2000, he had handed over two sealed envelopes to PSI Chodankar for the purpose of examination, through Crime Branch. He has produced the muddemal register. A photo-copy of the relevant extract of the Muddemal Register is at Exhibit-45. He has denied the suggestion that sealed envelopes were handed over to PW.4 PI Chodankar on 16.1.2000. He has admitted that no date is put against his signature and the signature of PSI Chodankar.

7. Mr. Arun Bras de Sa, learned Counsel appearing on behalf of the accused has urged before me that there is absolutely no satisfactory evidence regarding the deposit of the seal by PSI Chodankar after the raid. For this purpose, he has drawn my attention to the evidence of PW.4 PSI Chodankar and has submitted

that PSI Chodankar in his testimony does not state anything about the deposit of the seal. Even in the receipt at Exhibit-29 there is no reference to the deposit of the seal. Even in the complaint at Exhibit-27 also there is no reference to the seal. The specimen seal impression letter at Exhibit PW.1/B bears the date of 16.1.2000. PW.3 Janardhan, in his cross examination, has stated "The writing of the panchanama was done at the table which was available on the spot, but I cannot say to whom the table was belonged. Dy. SP Gawas was along with PSI Chodankar before I was detained. It is not true that I have falsely stated so. I do not recall if any typing was done at the spot." (emphasis supplied.) Thus, on the basis it is urged before me that the specimen seal continued to remain in possession of PW.4 PSI Chodankar and the specimen seal impression letter was scribed subsequently. It is urged, PW.6 Warkar has admitted that he had handed over the muddemal property to PSI Chodankar on 17.1.2000 and it is thereafter that the specimen seal impression letter was prepared. For this submission, learned Counsel has placed reliance on the fact that in the specimen seal impression letter at Exhibit PW.1/B, the month and the year are typed, also the body of the letter. It is, therefore, submitted that if the specimen seal impression letter was prepared on 16.1.2000 itself, there was no necessity of putting only

the date "16" in ink. It is then submitted that as per acknowledgement at Exhibit PW.2/A given by PW.2 Manohar Joshi, he has acknowledged having received the contraband drugs from P.C. S.S. Gawas of Anjuna Police Station. According to the learned Counsel, there is no evidence as to when the Police Constable S.S. Gawas was handed over the possession of the drugs. Strong reliance is placed by the learned Counsel for the appellant on the Judgment of the Division Bench of this Court dated 4/3/1999 in Criminal Appeal No.37/1988.

8. The infirmities which have been pointed out by the learned Counsel for the appellant can briefly be summed up as (1) there is an apparent falsehood stated by both PW.3 Janardhan Parab and PW.4 PSI Chodankar regarding the answer given by the appellant/accused in response to the offer conveyed to him regarding search in the presence of either a Gazetted Officer or a Magistrate. Both, PW.3 Janardhan and PW.4 Chodankar state that the accused declined to be searched in the presence of either. However, in the cross examination both of them have admitted that the accused had stated that he could be searched before S.D.P.O. Gawas. This is also reflected in the complaint at Exhibit-27. (2) According to PW.4 PSI Chodankar, a constable had brought both the panch witnesses. However, according to PW.3 Janardhan, it was PW.4 PSI Chodankar who had requested him to act as a

panch. In fact PW.3 Janardhan then makes a startling admission that the talks between PSI Chodankar and the accused took place before he was detained. Thus, there is no satisfactory evidence regarding the appraisal of right to the accused under Section 50 of the NDPS Act. (3) PW.6, Ganpati Warkar states that he had delivered the muddemal property in possession of PW.4 PSI Chodankar. As per PW.2 Manohar Joshi, the property had been received by him through P.C. S.S. Gawas. Subsequently, the seal continued to remain in possession of PW.4 PSI Chodankar and PSI Chodankar does not state of having received the property from PW.6 Ganpati Warkar and handing it over to PC S.S. Gawas for onward transmission. This is a vital link which the prosecution has not been able to establish by cogent evidence.

9. In order to sustain the conviction, it is vital for the prosecution to establish that what was seized from the possession of the accused was the same article which was sent for analysis, which is found to be the contraband under the NDPS Act. It was, therefore, vital for the prosecution to lead evidence that immediately after the raid specimen seal had been deposited by the raiding officer and till the property was sent for analysis, the Raiding Officer had no access either to the sealed property or to the specimen seal.

The Division Bench of this Court in its Judgment dated 4.3.1999, in Criminal Appeal No.37/1998 (Wessel Van Beelan vs. State of Goa) had found that the seal had been handed over to the incharge of the Police Station and sealed envelope and the seal was procured subsequently probably for affixing the specimen seal to the forwarding letter. The Division Bench, in these circumstances, held that the prosecution case became suspect and the circumstances did not rule out the possibility of tampering. In the present case, apart from the fact that there is no evidence that specimen seal had been deposited by PW.4, there is evidence of PW.6 Warkar that the sealed property had been handed over to PW.4 Chodankar for onward transmission. The evidence of PW.4 Chodankar is silent on this aspect and if PW.4 PSI Chodankar continued to remain in possession of the specimen seal impression as also the seized property, the possibility that the seal and the property had been tampered with cannot be ruled out. At least there is no satisfactory evidence to dispel such a possibility. In the face of the infirmities which have been noticed by me, it is difficult to sustain the conviction of the appellant/accused.

10. In the light of the findings above, Criminal Appeal No.32/2003 is allowed. The conviction and sentence passed by the Special Judge, NDPS Court,

Mapusa, for an offence punishable under Section 20(b)(ii) of the NDPS Act, is, hereby, quashed and set aside and the appellant is acquitted for the offence for which he was charged and convicted. The appellant be set at liberty forthwith, if not wanted in any other case. Fine, if paid, be refunded to the appellant.

P.V. HARDAS, J.

ssm.